IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of	)	No. 62439-3-I
	)	consolidated with
VALERIE ANN PENNINGTON,	)	No. 62831-3-I
now known as VALERIE FOX,	)	
	)	
Appellant,	)	
	)	
and	)	
	)	
JOHN EDWARD PENNINGTON, JR.,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: April 26, 2010
	)	

Ellington, J. — In these consolidated appeals, Valerie Pennington challenges an order entering a final parenting plan and seeks discretionary review of a subsequent order dismissing her petition to modify the plan. Because her challenges to the parenting plan either lack merit or are not properly before us, we affirm that order. We conclude, however, that irregularities in the proceedings adjudicating her modification petition warrant discretionary review and a remand for further proceedings.

FACTS

On July 27, 2006, the superior court entered a decree dissolving the marriage of Valerie and John Pennington. The parenting plan designated John the primary residential parent of the Penningtons' daughter, G.P.

In its findings, the court found that both parents lacked credibility, had engaged in the abusive use of conflict, and had limiting factors justifying residential restrictions. The court found that Valerie "has a long term emotional impairment, which interferes with the performance of parenting functions ."[1] It also found that while John does not have a history of domestic violence, he has "a propensity to demonstrations of anger and intimidation that cannot be ignored."[2] The court ordered John to complete an anger management course.

The parenting plan included provisions for monitoring both the plan and Valerie's mental health. The monitoring was intended to provide Valerie with an opportunity to expand her residential time. The plan provided that failure to monitor either the plan or Valerie's mental health would result in the elimination of any provisions for such expansion and restriction of residential time to the current schedule. The plan called for a review of the schedule when G.P. reached school age.

In August 2006, the court disapproved two proposed monitors and later ordered the parties to submit additional names. The court indicated it would pick a monitor from the names already presented if no other monitors were proposed.

In October 2007, the court terminated the monitoring provisions in the parenting plan due to the parties' noncompliance with those provisions. The presentation of a corrected parenting plan reflecting that termination as later set for August 4, 2008.

On July 11, 2008, Valerie filed motions for a restraining order, a domestic

[1] Clerk's Papers at 1133.

[2] Clerk's Papers at 1128.

violence assessment, a temporary order changing custody, a change in venue, and other relief. The motions, which were noted for the court commissioner's department, were based on allegations of domestic violence and other abusive conduct made by John's new wife, Anne Pennington, as well as a domestic violence protection order and fourth degree assault charges filed against John in King County.

At a hearing held on July 17, Valerie argued that an evidentiary hearing on the new allegations should be held before the court entered a final parenting plan. Noting that there were issues regarding the scope and timing of an evidentiary hearing, the court stated that evidence could be presented at the August 4 hearing on presentation of a corrected parenting plan, but Valerie would first have to file a formal motion for an evidentiary hearing. The court denied Valerie's July 11 motions without prejudice because they were improperly noted for hearing in the commissioner's department.

On July 23, 2008, Valerie refiled her motions along with a new motion and declaration for the presentation of oral testimony. She argued that oral testimony on the recent allegations was relevant to issues in the parenting plan and the best interests of G.P.

On August 4, 2008, the court held the previously scheduled hearing for presentation of the corrected parenting plan. It denied Valerie's motion for a domestic violence assessment on the ground that the parenting plan was already final and the August 4 hearing was merely for housekeeping purposes, to memorialize changes previously made to the plan. The court concluded that the motion to grant oral testimony was only "sort of an evidentiary hearing request" and that there was not

sufficient time to take testimony that day in any event. The court denied Valerie's other motions without prejudice and signed the parenting plan.

On August 22, 2008, Valerie filed a summons and petition[3] for a parenting plan modification, along with motions for a temporary custody order and an evidentiary hearing. In support, she filed a declaration from John's current wife, Anne Pennington. Anne alleged that between early 2006 and their separation in May 11, 2008, John engaged in acts of domestic violence and other abusive conduct that was witnessed and/or suffered by G.P. She alleged that John "was prone to severe mood swings, yelling, slamming doors, showing aggression on his face. . . , throwing things, towering over [Anne], and calling [her] names,"[4] including "Bitch, Fat chick, Dipshit, Dumbshit, Idiot, Asshole etc."[5] She recounted incidents in which John allegedly twisted her nipples and jabbed at her breasts despite her obvious pain and protests to stop, intentionally hurt her during roughhousing and laughed when she became angry, and crushed a pair of reading glasses and threw them at her head. She also alleged that when she returned to John's residence to pick up her belongings, she found a revolver and bullets on a chair next to the door. She viewed this as "a thinly veiled threat" to her as well as a safety issue for G.P.[6]

---

[3] Although the petition is not in the record, the court stated at the September 8, 2008 hearing that there was "a petition for modification" before the court. Also, John filed a motion "to dismiss petition for modification" on August 28, 2008.

[4] Clerk's Papers at 169.

[5] Clerk's Papers at 174.

[6] Clerk's Papers at 171.

According to Anne, John was emotionally abusive to G.P. He repeatedly told G.P. he had another daughter who stayed with him when G.P. was at her mother's home. He told G.P. that the other daughter played with G.P.'s things while she was gone, that she was better behaved than G.P., and that he loved her more than G.P. He would often tell G.P. he loved her, but when G.P. said she loved him, he would say with a serious face "I don't love you." Finally, she alleged that John once became enraged when G.P. had to urinate during a car trip. He "grabbed her by the front of her overalls and yanked her out of the car such that her body looked like a ragdoll."[7] He then "jerked her pants down, yelling at her while she urinated."[8] IG.P.'s face exhibited "sheer terror."[9] John denied or explained all of Anne's allegations in a responsive declaration.

Valerie also filed declarations from a psychiatrist, Dr. Burlingame, and G.P.'s physician, Dr. Lyons. Dr. Burlingame stated he had read Anne's declaration and "it appears that Mr. Pennington has a psychiatric disorder, such as Bipolar Disorder. In my opinion he is in need of a psychiatric assessment."[10] Dr. Lyons opined that John should not have unsupervised contact with G.P. due to the risk of mental abuse and potential escalation to physical and/or sexual abuse. Valerie argued that an evidentiary hearing was necessary because the allegations were relevant to the current pending motions and G.P.'s best interests. John challenged the admissibility and

---

[7] Clerk's Papers at 181.

[8] Id.

[9] Id.

[10] Clerk's Papers at 167.

relevance of the declarants' allegations and argued that they failed, in any event, to overcome the presumptions in favor of custodial continuity or to demonstrate adequate cause to modify the parenting plan.

By letter dated September 4, 2008, the court denied Valerie's motion for an evidentiary hearing without comment.

On September 8, 2008, the court recused itself from hearing Valerie's remaining motions, including her modification petition and motion for a change of venue. The court noted that Valerie's declaration included a statement that she viewed Anne Pennington's domestic violence allegations as "sweet vindication of the concerns that I have 'repeatedly' raised during the course of this litigation."[11] The court concluded this comment required recusal:

> I think it puts the Court in somewhat of a strange dilemma because if I rule in favor of the person who makes that statement, then it makes it look like I'm siding with that person because of this kind of sweet vindication interpretation. But if I rule against that person, then it looks like somehow that ruling can only be made out of bias.
>
> I'm not comfortable proceeding under those circumstances. I think that that puts the Court in an untenable dilemma that is not resolvable in any form or fashion. There is basically nothing I can say that can resolve the problem. Short of recusal, that's the only solution I've got. With regard to those motions, I'm recusing myself, and you can resubmit those to the Commissioner's Department.[12]

The court then proceeded to take up the school age review of the residential schedule. Valerie's counsel objected, stating, "I would think the court's logic also encompasses the current subject matter that is being addressed by the Court now. If

[11] Clerk's Papers at 198.

[12] Report of Proceedings (RP) (Sept. 8, 2008) at 4–5.

the court is going to recuse itself, I would ask the Court to recuse itself off everything at this point in time."[13] The court disagreed, noting that the school age review had been contemplated since the time of trial. The court proceeded to enter John's proposed final parenting plan, which included a number of changes associated with G.P.'s school schedule.

On October 3, 2008, Valerie filed another petition for modification of the parenting plan. On October 24, 2008, she filed a motion for a restraining order and temporary custody of her daughter.

On November 7, 2008, the parties appeared before a court commissioner on Valerie's motions. The commissioner dismissed the petition for modification, ruling there was not adequate cause "because the court finds no substantial change of circumstances between the entry of the final parenting plan on 9/8/08 and the filing of this instant proceeding less than one month later on 10/3/08."[14] The commissioner also denied Valerie's motion to change venue. Valerie moved for revision in superior court.

On December 5, 2008, the judge who had previously recused from hearing the modification and venue matters denied Valerie's motion to revise the commissioner's ruling.

Valerie appealed the September 8, 2008 final parenting plan and moved for discretionary review of the December 5, 2008 decision denying revision in the modification/venue matter. A commissioner of this court ruled that while Valerie did not

[13] RP (Sept. 8, 2008) at 8.

[14] Clerk's Papers at 12.

appear to meet the criteria for discretionary review of the revision decision, the issues in the two appeals "are closely tied and . . . a panel of judges that reviews the parenting plan may wish to consider the issues raised in the modification proceeding."[15] Accordingly, the commissioner consolidated the appeals and directed the parties to brief the issue of whether this court should review the December 5 decision on revision.

DECISION

Assuming without deciding that the December 5, 2008 decision is not reviewable as a matter of right, we conclude discretionary review of that decision is warranted under RAP 2.3.[16] We therefore address the merits of both appeals below.

Valerie first contends the court abused its discretion when it eliminated the monitoring provisions in its August 4, 2008 parenting plan. But as John correctly points out, the August 4 plan was a final order and therefore had to be appealed within 30 days. Because Valerie did not timely appeal that order, she cannot challenge it here.[17]

Valerie also contends the court erred in denying her a domestic violence assessment. She argues that once Anne Pennington's allegations came to light, RCW 26.09.191(4) required the court to order a screening assessment as part of the parenting plan proceedings. We disagree.

---

[15] Commissioner Notation Ruling, 2/6/09.

[16] Discretionary review may be accepted when "[t]he superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court." RAP 2.3(b)(3).

[17] RAP 5.2(a), 6.1; Buckner Inc. v. Berkey Irrigation Supply, 89 Wn. App. 906, 911, 951 P.2d 338 (1998) (timely notice of appeal is prerequisite to appellate jurisdiction).

RCW 26.09.191(4) provides that "[i]n cases involving allegations of limiting factors," including allegations of domestic violence or emotional abuse, "both parties shall be screened to determine the appropriateness of a comprehensive assessment regarding the impact of the limiting factor on the child and the parties." In denying a screening assessment, the superior court stated that it had already entered a final parenting plan. The court implicitly, and we think reasonably, concluded that the assessment requirement in RCW 26.09.191(4) is intended to apply during the formation or modification of a parenting plan.[18] Because a final parenting plan adjudicating domestic violence allegations was in place and no petition for modification had been filed, the court did not abuse its discretion in denying the motion for a screening assessment at the time of the August 4, 2008 hearing.[19]

Next, Valerie assigns error to the court's failure "to convene an adequate cause evidentiary hearing prior to entry of the final Parenting Plan" on September 8, 2008.[20] She contends the court erred because she demonstrated a substantial change in

[18] Contrary to Valerie's assertions, nothing in the statute supports an "implication that the screening/assessment will apply at any stage of the proceeding where abuse is alleged." But even accepting her interpretation of the statute, the court did not abuse its discretion in concluding that Valerie's allegations should be addressed in the modification action rather than the parenting plan proceedings. A final parenting plan was in place and was being reviewed solely for the limited purpose of conducting a prescheduled school age review of the residential schedule. And because G.P. was not in imminent danger, there was no need to handle the assessment issue on an emergency basis.

[19] As John correctly notes, the need for and timing of assessments is a matter left largely to the discretion of the trial court. See RCW 26.09.003 ("Judicial officers should have the discretion and flexibility to assess each case based on the merits of the individual cases before them.").

[20] Appellant's Br. at 1.

circumstances and adequate cause for a hearing under the modification statute, RCW 26.09.270. But Valerie first requested an evidentiary hearing at the July 17 and August 4, 2008 hearings, and no petition for modification had yet been filed when those hearings were held. Although Valerie evidently filed a modification petition on August 22, 2008, the court recused itself from that petition and referred it to the commissioner's department. Valerie does not challenge the court's decision to recuse. Accordingly, the court did not err in failing to rule on her modification petition and/or request for an adequate cause hearing prior to entering the September 8 parenting plan.

Valerie argues that the court demonstrated an appearance of unfairness when, during the hearing on August 4, 2008, it commented on the King County protection order. This argument is meritless. Trial judges are presumed to perform their functions regularly and properly without bias or prejudice,[21] and a party claiming otherwise must support their claim with evidence of the judge's actual or potential bias.[22] The court's comment in this case falls well short of that standard. The court stated that, based on what it knew about the King County proceedings, it would not have issued a protection order in that matter. Noting the distinction between a pattern of domestic violence and evidence of an anger problem, the court explained that its comment was intended to show "what I think the level of burden is by being kind of totally candid ."[23] This

[21] Kay Corp. v. Anderson, 72 Wn.2d 879, 885, 436 P.2d 459 (1967); Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945 (1993).

[22] State v. Dominguez, 81 Wn. App. 325, 328–29, 914 P.2d 141 (1996); State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

comment does not demonstrate either actual or potential bias.

Valerie next contends the court abused its discretion in refusing to recuse from all matters before it, including the residential schedule issues, once it recused from the modification petition.[24] While this would have been the safest course, we cannot say the court abused its discretion. The court's recusal was not based on any bias or interest that required it to recuse from all aspects of the case. Rather, it was based on statements specific to the modification petition and an appearance of bias that could arise if it ruled on the petition and thus appeared to agree or disagree with those statements. The court did not exceed its discretion in concluding that these problems were limited to the modification petition and did not require it to recuse from the remaining parenting plan issues.

Last, Valerie challenges the revision court's decision denying her motion for a change of venue and dismissing her petition for modification. We conclude that irregularities in the superior court's handling of the motion to revise require us to remand for further proceedings.

First, the court's decision denying an adequate cause hearing and dismissing the modification petition is inadequate for review. Although written findings are not required for such decisions, the court's reasons must be articulated on the record.[25]

---

[23] RP (Aug. 4, 2008) at 15.

[24] We review a decision on a motion to recuse for abuse of discretion. Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 840, 14 P.3d 877 (2000).

[25] In re Parentage of Jannot, 110 Wn. App. 16, 25, 37 P.3d 1265 (2002); Kinnan v. Jordan, 131 Wn. App. 738, 750, 129 P.3d 807 (2006).

Here, the only reason given for the decision on adequate cause is the commissioner's conclusory finding, which we impute to the revision court, that there was "no substantial change of circumstances between the entry of the final parenting plan on 9/8/08 and the filing of this instant proceeding."[26] It is unclear form this ruling whether the court considered Valerie's evidence but concluded it fell short of demonstrating a change from the circumstances found in earlier proceedings, or whether the court simply concluded that the evidence need not be considered at all because it involved events preceding the September 8, 2008 parenting plan.

Second, the finding that there was "no substantial change of circumstances *between the entry of the final parenting plan on 9/8/08 and the filing of* [the modification petition] . . . *on 10/3/08*" misframes the issue before the court.[27] Valerie filed her modification petition *before* that plan was entered. But for the court's recusal, she would have only had to demonstrate a substantial change in circumstances occurring since the last contested parenting plan, which would have been either the corrected plan entered on August 4, 2008, or the original plan entered on July 27, 2006.[28] The court recused, however, telling Valerie she could "resubmit" her petition for modification

---

[26] Clerk's Papers at 12; see also State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007) (if the superior court simply denies the motion to revise the commissioner's findings or conclusions, court then adopts the commissioner's findings, conclusions, and rulings as its own).

[27] Clerk's Papers at 12 (emphasis added).

[28] Because the parenting plan entered on August 4, 2008, was merely a corrected plan entered for the sole purpose of memorializing a monitoring provision ruling made by the court months earlier, it was arguably not the type of contested plan from which a change in circumstances would normally be measured.

and her motion for change of venue before the commissioner. She then refiled her petition. In these circumstances, the revision court erred in measuring the change in circumstances from the entry of the September 8, 2008 parenting plan.

Third, Valerie contends, and we agree, that the court erred in recusing from the modification and venue issues and then hearing the motion to revise the commissioner's decision on the very same issues. As noted above, the court concluded that it could not rule on the modification and venue issues without looking like it was making a decision "out of bias." John's counsel agreed, stating in a pleading that "[t]here is no conflict of interest and no prejudice to either party with any commissioners or judges hearing this matter in this county *except Judge Lucas who recently recused himself at the September 8, 2008 hearing*."[29] In these circumstances, it was error, as well as a violation of the court's own ruling, for the court to hear the motion for revision.[30]

In conclusion, the final parenting plan and associated rulings denying Valerie's motions for an assessment and evidentiary hearing are affirmed. The order denying Valerie's motion for revision is reversed and remanded for proceedings consistent with this opinion.

---

[29] Clerk's Papers at 32 (emphasis added).

[30] State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972) (the law requires more than an impartial judge; it requires the appearance of impartiality). We reject John's contention that this error was not preserved. Valerie's counsel made it abundantly clear when the court initially recused from the modification/venue matters that the court's reasoning required it to recuse "off everything ." RP (Sept. 8, 2008) at 8.

Ellington, J.

WE CONCUR:

Dwyer, C.J.

Grosse, J.